

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Heidi Guzman	Team: Bias Squad #02	CCRB Case #: 202208613	<input checked="" type="checkbox"/> Force <input checked="" type="checkbox"/> Discourt. <input type="checkbox"/> U.S. <input checked="" type="checkbox"/> Abuse <input checked="" type="checkbox"/> O.L. <input type="checkbox"/> Injury
Incident Date(s) Tuesday, 12/06/2022 11:31 PM	Location of Incident: 34th Street - Penn Station subway station	18 Mo. SOL 6/6/2024	Precinct: 14
Date/Time CV Reported Thu, 12/08/2022 3:34 PM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 12/19/2022 5:41 AM

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. PO Brendan Dono	31863	936506	010 PCT
2. Officers			

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. PO Showrov Khan	20056	967946	TD 2
2. PO Jennifer Caruso	00168	966494	010 PCT
3. PO Tiara Hamilton	14101	972346	013 PCT
4. LT Richard Wasley	00000	937715	TD 2
5. DTS Thomas Longa	07623	965914	ESS 01
6. PO Robert Brower	09982	956460	ESS 01
7. SGT Alexander Gorman	01868	953923	TD 01 LTP
8. PO Michael Charubin	22995	962310	TD 01 LTP
9. PO Andrew Viscio	10486	970301	010 PCT
10. LT Yuzhou Wu	00000	933494	TB SSTF
11. PO Jonathan Hui	13328	955991	TB SSTF
12. PO Erick Salas	17727	964270	TD 1
13. PO Sadique Chowdhury	03011	967453	TD 2
14. PO Justin Segot	07684	939447	TD 1
15. PO Eric Vasquez	17998	968171	TD 2
16. SGT Peter Rogers	02508	937421	TD 2
17. SGT Stephen Macomber	02987	945232	MS TIMES SQ
18. PO Jacob Hecker	30171	973459	MS TIMES SQ
19. PO Daming Wu	03034	957296	TD 01 LTP
20. PO Christopher Grieco	15320	956701	TD 01 LTP
21. SGT Luis Delgado	00683	921275	TD 01 LTP
22. PO Robert Oleksa	03336	950975	TD 01 LTP
23. PO Liam Mchugh	25837	965324	013 PCT

Officer(s)	Allegation	Investigator Recommendation
A . PO Brendan Dono	Force: Police Officer Brendan Dono used physical force against § 87(2)(b)	

Officer(s)	Allegation	Investigator Recommendation
B . PO Brendan Dono	Discourtesy: Police Officer Brendan Dono spoke discourteously to § 87(2)(b)	
C . PO Brendan Dono	Abuse: Police Officer Brendan Dono threatened to remove § 87(2)(b) to the hospital.	
D . PO Brendan Dono	Off. Language: Police Officer Brendan Dono spoke offensively regarding § 87(2)(b) actual or perceived disability.	
E . PO Brendan Dono	Force: Police Officer Brendan Dono used a chokehold against § 87(2)(b)	
F . PO Brendan Dono	Force: Police Officer Brendan Dono restricted § 87(2)(b) breathing.	
G . Officers	Force: Officers used a chokehold against § 87(2)(b)	
H . Officers	Force: Officers restricted § 87(2)(b) breathing.	
I . PO Brendan Dono	Off. Language: Police Officer Brendan Dono spoke offensively regarding § 87(2)(b) actual or perceived disability.	
J . PO Brendan Dono	Abuse: Police Officer Brendan Dono took law enforcement action based upon actual or perceived disability	
K . PO Brendan Dono	Abuse: Police Officer Brendan Dono took law enforcement action based upon actual or perceived housing status.	

## Case Summary

On December 8, 2022, Lt. Richard Wasley of Transit District 2 reported this complaint to the Internal Affairs Bureau on behalf of a prisoner, § 87(2)(b) (**Board Review 01**). On December 19, 2022, the complaint was forwarded to the CCRB. The case was initially assigned to Supervising Investigator Owen Godshal in the General Investigations Division. On January 3, 2023, the case was accepted by the Racial Profiling and Biased Policing Investigations Unit and assigned to Investigating Attorney Heidi L. Guzmán.

At approximately 10:00 p.m. on December 6, 2022, § 87(2)(b) attempted to enter the 34<sup>th</sup> Street Penn Station A/C/E subway station in Manhattan without paying the fare. Police Officer Brendan Dono, of the 10<sup>th</sup> Precinct, prevented him from going through the emergency exit by pushing him back (**Allegation A, Force**, § 87(2)(g) § 87(2)(b) continued to attempt to evade the fare, and PO Dono told § 87(2)(b) to “get the fuck back” (**Allegation B, Discourtesy**, § 87(2)(g) PO Dono then asked § 87(2)(b) “do you wanna go to Bellevue?” (**Allegation C, Abuse of Authority**, § 87(2)(g) **Allegation D, Offensive Language**, § 87(2)(g) PO Dono’s partner on the incident date, Police Officer Tiana Hamilton, called for additional units. Several officers arrived and began to physically eject § 87(2)(b) from the transit system (**Allegations E-F, Force**, § 87(2)(g) **Allegations G-H, Force**, § 87(2)(g) While officers attempted to restrain § 87(2)(b) PO Dono told § 87(2)(b) to “stop screaming like a maniac” (**Allegation I, Offensive Language**, § 87(2)(g) It is alleged that PO Dono took law enforcement action on the basis of his housing status and disability (**Allegations J-K Abuse of Authority, Bias-Based Policing**, § 87(2)(g) § 87(2)(b)

The investigation received body-worn camera video capturing the incident (**Board Review 02**).

## Findings and Recommendations

**Allegation (A) Force: Police Officer Brendan Dono used physical force against § 87(2)(b)**  
**Allegation (B) Discourtesy: Police Officer Brendan Dono spoke discourteously to § 87(2)(b)**  
§ 87(2)(b)

In his statement to the CCRB, § 87(2)(b) testified that on the evening of December 6, 2022, he went to the 34<sup>th</sup> Street Penn Station A/C/E subway station (**Board Review 03**). § 87(2)(b) was heading home to the shelter where he lived at the time. § 87(2)(b) had drunk about a pint of brandy before heading to the subway. During his interview, § 87(2)(b) noted that he did not recall large portions of the incident due to a combination of the trauma of the incident, his alcohol consumption, and his mental health diagnoses.

§ 87(2)(b) stated that he swiped his Metrocard and entered the station via a turnstile, where he encountered PO Dono and PO Hamilton. § 87(2)(b) did not recall how they first began to interact. § 87(2)(b) noted that he suffers from schizophrenia and that the officers frightened him. § 87(2)(b) told PO Dono and PO Hamilton that he was taking medication for his condition.

§ 87(2)(b) further testified that he was just on the other side of the turnstiles when PO Dono became angry. § 87(2)(b) believes that he may have gotten too close to PO Dono; he did not recall how they first exchanged words. PO Dono then pushed § 87(2)(b) back, touching him on the shoulders and forcefully shoving him. § 87(2)(b) who has a small frame, fell back onto the ground, landing on his neck and back.

§ 87(2)(b) stood back up and confronted PO Dono, asking why PO Dono pushed him. § 87(2)(b) requested to speak to PO Dono's supervisor, then told PO Dono that he had not been aggressive and did not deserve to be pushed. This appeared to anger PO Dono, who told him to "get the fuck out of my face" and pushed § 87(2)(b) a second time. § 87(2)(b) again landed on his back.

In his statement to the CCRB, PO Dono testified that on the incident date, he was temporarily assigned to an overtime post in the transit system (**Board Review 04**). PO Dono was working at the turnstiles to the A/C/E lines at 34<sup>th</sup> Street Penn Station when he noticed § 87(2)(b) was standing outside of the turnstiles and acting "a little erratic." § 87(2)(b) appeared to be intoxicated and smelled of alcohol.

PO Dono opened the emergency exit door to the station to let another NYPD officer come in. § 87(2)(b) then tried to "force" his way through the door, sticking his upper half through the door. PO Dono told § 87(2)(b) that he could not come in through the door unless he had paid the fare. § 87(2)(b) then lunged at PO Dono.

PO Dono further testified that he used his left hand with an open palm and pushed § 87(2)(b) out of doorway, then closed the door.

A few minutes later, § 87(2)(b) jumped over a turnstile and came "right up" to PO Dono's face. Fearing § 87(2)(b) may try to attack him, PO Dono extended his arm with an open palm to keep some distance between them. § 87(2)(b) slapped PO Dono's hand and lunged at him approximately four more times. All throughout, PO Dono repeatedly instructed § 87(2)(b) to leave the station.

Upon the fifth lunge by § 87(2)(b) at him, PO Dono then pushed § 87(2)(b) back again with his open palm. § 87(2)(b) then fell through the turnstile. § 87(2)(b) then got back up and went to PO Dono again. § 87(2)(b) then made several threatening comments, such as: "I'll beat your ass up"; "I'll punch you in the nose"; "Come over here I'll beat your ass"; "Cross the line I'll beat your ass"; "Cross this shit I'll beat your ass"; and "I'll punch you in your fucking face," among others.

PO Dono testified that he told § 87(2)(b) to "get the fuck out of here" because asking § 87(2)(b) to leave politely did not work for "fifteen times" before. PO Dono provided that he believed using profanity would emphasize his point and cause § 87(2)(b) to "get the hint and leave." However, § 87(2)(b) continued to yell at PO Dono and attempt to slap and punch him.

The investigation received body-worn camera video depicting this incident (**Board Review 02**). PO Dono's body-worn camera video largely accords with PO Dono's testimony. The one-minute buffer video with no audio before PO Dono activated his camera depicts § 87(2)(b) sticking his torso through the emergency exit door. At 00:03, PO Dono pushes § 87(2)(b) out of the doorway, causing § 87(2)(b) to fall backwards.

At 00:24 in PO Dono's body-worn camera, § 87(2)(b) hops the turnstile and comes up to PO Dono. At 00:45, § 87(2)(b) takes a fighting stance and PO Dono pushes him with both hands, making contact with § 87(2)(b) chest. At 00:54, § 87(2)(b) is back near PO Dono and PO Dono pushes him again.

At 1:00, when the audio comes on, § 87(2)(b) is heard asking someone to call the police. PO Dono tells § 87(2)(b) "Get the fuck out of here. I told you to leave."

Section 1050.4(a) of the New York City Rules and Regulations provides that no person shall “use or enter upon the facilities or conveyances of the authority, for any purpose, without the payment of the fare” (**Board Review 05**). In addition, no person shall “enter or remain in any facility or conveyance while their ability to function safely in the environment of the transit system is impaired by the consumption of alcohol or by the taking of any drugs” (**Board Review 05**). Those in violation of the rules governing the transit authority, “who may receive or [have] received a notice of violation” are “subject to ejection from the facilities” pursuant to 21 NYCRR § 1050.11 (**Board Review 05**).

Patrol Guide Procedure § 212-20 provides, “Any person who violates any portion of NYCRR Part 1050, regardless of whether or not that person has also been issued a Transit Adjudication Bureau/Notice of Violation (TAB summons) or a Criminal Court Summons for that violation, is subject to ejection from New York City Transit facilities.” It further states that officers may use necessary force to eject a passenger “when necessary to eject a passenger.” (**Board Review 06**).

Patrol Guide Procedure § 221-01 states that force may be used when it is reasonable to ensure the safety of a member of the service or a third person, or otherwise protect life, or when it is reasonable to place a person in custody or to prevent escape from custody (**Board Review 07**). In all circumstances, any application or use of force must be reasonable under the circumstances. When appropriate and consistent with personal safety, members of the service will use de-escalation techniques to safely gain voluntary compliance from a subject to reduce or eliminate the necessity to use force. In officers’ use of force, and in a determination of reasonableness of that force, multiple factors are considered including the nature and severity of the crime/circumstances, actions taken by the subject and the duration of those actions, immediacy of the perceived threat or harm to any party, whether the subject is actively resisting custody, whether the subject is attempting to evade arrest by flight, number of subjects in comparison to the number of MOS, physical condition and age of the subject in comparison to the MOS, subject’s violent history, if known, presence of hostile crowd or agitators, and any stimulant or narcotic use that may affect pain tolerance or the likelihood of violence.

The NYPD is mandated to accomplish its mission by treating citizens with compassion, courtesy, professionalism, and respect; officers pledge to value human life, respect the dignity of each individual and render services with courtesy and civility pursuant to Patrol Guide Procedure § 200-02 (**Board Review 08**). However, “profane remarks, made during stressful situations or while an officer is trying to get a chaotic situation under control, are not misconduct” according to Disciplinary Case No. 2017-17005. (**Board Review 08**).

As evidenced by PO Dono’s body-worn camera footage, § 87(2)(b) attempted to, and later entered, the transit system several times without paying the fare. Moreover, he jumped the turnstiles to physically confront PO Dono. § 87(2)(g)

Although § 87(2)(b) was smaller in physical condition and size, he continued to approach PO Dono in a threatening manner. In addition, § 87(2)(b) was intoxicated. § 87(2)(g)

The investigation credits PO Dono’s testimony that he instructed § 87(2)(b) multiple times to leave the station and back up without using profanity. § 87(2)(g)



**Allegation (C) Abuse of Authority: Police Officer Brendan Dono threatened to remove § 87(2)(b) to the hospital.**

**Allegation (D) Offensive Language: Police Officer Brendan Dono spoke offensively regarding § 87(2)(b) actual or perceived disability.**

§ 87(2)(b) did not testify to these allegations. The investigation came to these allegations based off the incident captured on body-worn camera video.

At 2:21 in PO Dono's body-worn camera video, PO Dono is depicted instructing § 87(2)(b) to step back several times. PO Dono then says, "Wanna go to Bellevue? You wanna go to Bellevue?" § 87(2)(b) replies, "Fuck you and Bellevue, bitch... I'm in mental health Bellevue bitch. You had no business touching me bitch." PO Dono then continues to instruct § 87(2)(b) to step back.

In his statement to the CCRB, PO Dono testified that § 87(2)(b) was an "obvious EDP" who may have been having a medical issue. PO Dono further stated that he could tell "something was not right" with § 87(2)(b). Thus, he offered to take § 87(2)(b) to the hospital for medical attention. PO Dono could smell the alcohol on § 87(2)(b). When asked about indications that § 87(2)(b) may have been high or on any substances, PO Dono noted that § 87(2)(b) had "manic" behavior, where he would "go real high, come back down a little bit." When asked to clarify § 87(2)(b) "errative" behavior, PO Dono provided that § 87(2)(b) was talking to himself and moving in an unsteady, "irrational" manner. When asked why he mentioned Bellevue Hospital specifically, PO Dono noted that Bellevue Hospital contains a psychiatric ward. PO Dono believed that a psychiatric ward was an appropriate medical measure because § 87(2)(b) was intoxicated, aggressive, and seemingly triggered.

PO Dono also testified that § 87(2)(b) appeared to be a danger to himself, noting that people usually do not run up and attempt to attack police officers. However, PO Dono noted that he could not speak to whether § 87(2)(b) was purposefully trying to hurt himself by acting in that manner.

Patrol Guide Procedure 221-13 commands an officer to take into protective custody an individual who appears to be mentally ill or temporarily deranged who conducts herself in a manner that a police officer reasonably believes is likely to result in serious injury to herself or another person (**Board Review 09**). Such an individual is an "emotionally disturbed person," and officers should arrange for such a person to be removed to a hospital via ambulance.

Administrative Guide 304-06 prohibits an officer from using discourteous or disrespectful remarks regarding an individual's disability (**Board Review 05**).

The body-worn camera video showed that an intoxicated § 87(2)(b) was yelling and approaching PO Dono in a threatening manner. § 87(2)(b) appeared to be taunting PO Dono, trying to provoke a physical altercation. § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

**Allegation (E) Force: Police Officer Brendan Dono used a chokehold against § 87(2)(b)**

**Allegation (F) Force: Police Officer Brendan Dono restricted § 87(2)(b) breathing.**

**Allegation (G) Force: Officers used a chokehold against § 87(2)(b)**

**Allegation (H) Force: Officers restricted § 87(2)(b) breathing.**

In his statement to the CCRB, § 87(2)(b) testified that after PO Dono pushed him a second time, a large group of officers arrived and “hounded” him. Terrified that the officers were going to beat him, § 87(2)(b) began to scream at passersby for help as the officers began to restrain him. The officers then threw him to the ground on his chest. The officers, including PO Dono, put their knees on his back. § 87(2)(b) who stated he is claustrophobic, began kicking and screaming to break free. The officers held him down. § 87(2)(b) told the officers that he could not breathe. § 87(2)(b) did not recall what happened immediately after this; he recalled that at some point an EMT or officer placed a sheet over his head, which made him even more scared and unable to breathe. § 87(2)(b) told the officers that he has “mental issues” and could not breathe, but officers did not explain what was going on.

In his statement to the CCRB, PO Dono testified that after at least a dozen attempts to get § 87(2)(b) to leave the transit system, six to nine transit officers arrived. The officers asked PO Dono what he wanted to do, and PO Dono told them that he just wanted them to remove § 87(2)(b) from the transit system.

PO Dono further testified that approximately twenty officers arrived as the original group of transit officers began escorting § 87(2)(b) out of the subway station. The officers and § 87(2)(b) got about fifty to sixty feet away from the turnstiles when § 87(2)(b) stopped cooperating. The officers brought § 87(2)(b) down to the ground in a seated position. They then tried to cuff § 87(2)(b) who was tensing up his arms, clenching, and resisting the cuffing. PO Dono joined the group of officers attempting to cuff § 87(2)(b). PO Dono noted that there were several officers involved in trying to cuff and restrain § 87(2)(b). He averred that the officers were making contact with § 87(2)(b) arms, with one officer possibly restraining the legs. PO Dono touched § 87(2)(b) left arm during this time.

PO Dono testified that he did not observe any officers make contact with § 87(2)(b) neck, either intentionally or unintentionally, or otherwise obstruct § 87(2)(b) breathing while he was in a prone position. PO Dono further denied doing so himself.

PO Dono further testified that he was wearing white gloves during the incident, which he pointed out for the investigation during his interview when relevant portions of his BWC were shown.

Body-worn camera video obtained by the investigation depicts the attempt to eject § 87(2)(b) which resulted in his falling to the ground (**Board Review 02**). It is apparent that several officers were involved in attempting to subdue § 87(2)(b) and many of them made contact with various parts of his body, including his upper back and near the base of his neck.

At 1:48 and 2:14 in PO Caruso’s BWC, a hand with a blue sterile glove is seen on the back of § 87(2)(b) head, possibly making contact with his neck. At 3:11, four officers are seen wearing blue sterile gloves. Despite a thorough review of all the body-worn camera received covering this incident from twenty-four officers who responded, the investigation was not able to identify which

officer may have had a hand on § 87(2)(b) head and/or neck in PO Caruso's BWC.

PO Dono's BWC depicts that he was wearing white gloves during the incident. PO Dono's hands are not depicted making contact with § 87(2)(b) neck. PO Dono is also not depicted applying pressure to § 87(2)(b) back while he laid in a prone position and/or on the ground.

§ 87(2)(b) acknowledged that he was terrified and claustrophobic while officers attempted to restrain him during the incident. Based on the available testimony and body-worn camera video, the investigation finds that § 87(2)(b) inability to breathe is most likely attributable to the circumstances of his mental health and the large number of officers attempting to cuff him, rather than an intentional or accidental obstruction of his airways or a chokehold. § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

**Allegation (I) Offensive Language: Police Officer Brendan Dono spoke offensively regarding § 87(2)(b) actual or perceived disability.**

The investigation came to these allegations based off the incident captured on body-worn camera video.

In his statement to the CCRB, PO Dono testified that he did not recall telling § 87(2)(b) to "stop screaming like a maniac." After being shown a portion of his body-worn camera, starting at 9:33, PO Dono acknowledged making this statement. PO Dono provided that he made this statement because § 87(2)(b) was saying that he could not breathe but was also screaming. PO Dono believed that if § 87(2)(b) stopped screaming, he would be able to breathe. PO Dono further provided that a "maniac" is "just a term, nothing specific," but conceded that it means "crazy person." PO Dono further stated that he uses the term maniac towards his children "all the time."

PO Dono's statement is depicted at 9:33 in his BWC. At 10:33, § 87(2)(b) yells out that he is "claustrophobic." At 28:20 in PO Charubin's BWC, § 87(2)(b) yells out that he has "ADHD, PTSD, and schizophrenia."

The NYPD is mandated to accomplish its mission by treating citizens with compassion, courtesy, professionalism, and respect; officers pledge to value human life, respect the dignity of each individual and render services with courtesy and civility pursuant to Patrol Guide § 200-02 (Board Review 06). Further, "profane remarks, made during stressful situations or while an officer is trying to get a chaotic situation under control, are not misconduct" according to Disciplinary Case No. 2017-17005, (Board Review 08). However, that Court held that an officer telling a bystander to "shut the fuck up," after the bystander complained about the use of excessive force, committed misconduct because the situation was "not so chaotic that the duty of courteous and professional behavior should be overridden by the immediate need to maintain order."

The Cambridge Dictionary defines the word "maniac," when referencing mental illness, as "a person who behaves in an uncontrolled way, not worrying about risks or danger" (**Board Review 10**). The Appellate Division has held that the word "maniac" is inappropriate when used by the prosecution to refer to a defendant. *People v. Butler*, 214 A.D.2d 1014 (4th Dept 1995); *People*



v. *Butts*, 184 A.D.3d 660 (2nd Dept 2020) (**Board Review 05**).

§ 87(2)(g) was indeed screaming. However, § 87(2)(b) was screaming while he was on the ground, surrounded by multiple officers trying to hold onto him. § 87(2)(b) acknowledged that he was terrified and claustrophobic while officers attempted to restrain him during the incident. He stated several times during the incident that he struggled with his mental health. § 87(2)(g)

**Allegation (J) Abuse of Authority: Police Officer Brendan Dono took law enforcement action based upon actual or perceived disability.**

**Allegation (K) Abuse of Authority: Police Officer Brendan Dono took law enforcement action based upon actual or perceived housing status.**

It is further alleged that PO Dono engaged in biased policing based on disability and housing status when he took law enforcement action against § 87(2)(b)

§ 87(2)(b) was arrested during this incident for theft of services, criminal possession of a weapon (a knife), and disorderly conduct.

In his statement to the CCRB, PO Dono noted that § 87(2)(b) was arrested after he pulled out a folding pocketknife from his pocket. PO Dono testified that § 87(2)(b) “skittered” the knife and threw it across the floor of the subway station. PO Dono provided that LT Richard Wasley, the highest-ranking officer on the scene, made the determination to arrest § 87(2)(b)

At 22:00 in PO Wu’s BWC, § 87(2)(b) can be seen wriggling on the ground and fishing into his back pocket. PO Wu and PO Brower then lunge forward and intercept the knife on the ground. Officers then confront § 87(2)(b) about the knife. § 87(2)(b) denies pulling out the knife, stating that it fell out of his pocket. § 87(2)(b) also notes that he keeps the knife on himself for protection.

The investigation received the arrest report for § 87(2)(b) (**Board Review 11**). The arrest report notes that § 87(2)(b) “threw a knife out of his pocket.”

NYPD Administrative Guide Section 304-17: Department Policy Prohibiting Racial Profiling and Bias-Based Policing prohibits the Department and individual officers from intentionally engaging in bias-based policing, which it defines as “an act by a member of the [] police department. . . that relies on the actual or perceived [] creed, age, immigration or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor in initiating law enforcement action against an individual, rather than individual’s behavior or other information or circumstances that links a person to suspected unlawful activity” (**Board Review 05**).

“The determinative factor” is “the one factor that tended to settle the [officer]’s decision” to take law enforcement action. *See Patrolmen’s Benevolent Ass’n v. City of N.Y.*, 142 A.D.3d 53, 65 (1st Dept 2016) (**Board Review 05**). While the “determinative factor” does not have to be the “sole factor” in the officer’s decision, *see PBA v. City of N.Y.*, 142 A.D.3d at 63, it must be a “but-for cause” of the officer’s decision—that is, the officer would not have taken the specific law enforcement action if not for the civilian’s protected identity trait gender, age, disability, housing

status, etc. *See Bostock v. Clayton Cty*, 140 S.Ct. 1731, 1739 (2020); *Kwan v. Andalex Group, LLC*, 737 F.3d 834, 846 (2d Cir. 2013); *Gannon v. UPS*, 529 Fed.Appx. 102, 105 (2d Cir. 2013); *Ioele v. Alden Press, Inc.*, 145 A.D.2d 29, 34 (1st Dep’t 1989); *Cannon v. N.Y.C. Police Dep’t*, 2016 Slip.Op. 30657, \*5 (N.Y. Co. Sup. Ct. April 13, 2016). (**Board Review 05**).

A finding that a civilian’s protected identity trait was the “determinative factor” in an officer’s decision to take law enforcement action can be based on direct or circumstantial evidence. *Gatling v. West*, 850 Fed.App’x. 91, 97 (2d Cir. 2021); *Millan-Hernandez v. Barr*, 965 F.3d 140, 148 (2d Cir. 2020); *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 40-41 (1st Dept 2011) (**Board Review 05**). Direct evidence includes “decisions that explicitly rely on the [civilian’s] protected trait,” as well as conduct or statements “directly reflecting [the officer’s] discriminatory attitude” toward members of the civilian’s demographic group. *See Young v. UPS*, 575 U.S. 206, 213 (2015); *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997) (**Board Review 05**). Direct evidence that an officer was motivated by the civilian’s protected trait is enough, on its own, to establish that such trait was more likely than not the determinative factor in the officer’s law enforcement action. *See Young*, 575 U.S. at 213.

In contrast, rarely is one piece of circumstantial evidence sufficient on its own to establish an officer’s discriminatory motive; instead, the factfinder must consider the “totality of the relevant facts.” *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Leblanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995) (**Board Review 05**). In addition, to establish that the civilian’s protected identity trait was the determinative factor in the officer’s decision to take law enforcement action, there must be circumstantial evidence that both (i) the officer’s decision was more likely than not motivated by the civilian’s identity trait; AND (ii) the officer’s stated non-discriminatory reasons for their actions were more likely than not false or pretextual (i.e., the officer would not have taken the law enforcement action based on those non-discriminatory reasons alone). *St. Mary’s Honor Ctr v. Hicks*, 509 U.S. 502, 515 (1993); *Naumovski v. Norris*, 934 F.3d 200, 217 (2d Cir. 2019); *Grella v. St. Francis Hosp.*, 149 A.D.3d 1046, 1047 (2d Dept 2017); *Bennett*, 92 A.D.2d at 36 (**Board Review 05**).

§ 87(2)(g)

“Epithets may be regarded as direct evidence of . . . animus and, when combined with other unlawful actions, may establish” that an officer engaged in biased policing.” *Hayden v. Patterson*, 594 F.3d 150, 163 (2d Cir. 2010); *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 40–41 (1st Dept 2011); *Louis v. Metro. Transit Auth.*, 145 F.Supp.3d 215, 226 (E.D.N.Y. 2015) (**Board Review 05**). However, this case presents an officer engaging in epithets in combination with lawful actions.

§ 87(2)(g)

### Civilian and Officer CCRB Histories

- This is the first CCRB complaint to which § 87(2)(b) has been a party (**Board Review 12**).
- PO Dono has been a member of service for eighteen years and has been a subject in thirty other CCRB complaints and forty-one allegations, of which one was substantiated. § 87(2)(g)  
[REDACTED]
  - 201610022 involved a substantiated allegation of a threat of summons against PO Dono. The Board recommended Command Discipline A and the NYPD imposed Command Discipline A.

### Mediation, Civil, and Criminal Histories

- This complaint was not suitable for mediation.
- As of August 7, 2023, the New York City Office of the Comptroller has no record of a Notice of Claim being filed in regards to this incident (**Board Review 13**).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]  
[REDACTED]

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Squad: Bias Squad 02

Investigator:	<u>Heidi L. Guzmán</u> Signature	<u>Heidi L. Guzmán</u> Investigating Attorney Print Title & Name	<u>January 29, 2024</u> Date
Squad Leader:	<u>Tessa Yesselman</u> Signature	<u>IM Tessa Yesselman</u> Print Title & Name	<u>January 29, 2024</u> Date
Reviewer:	<u>Bianca Victoria Scott</u> Signature	<u>Dep. Dir. RPBP Bianca Victoria Scott</u> Print Title & Name	<u>February 1, 2024</u> Date